

1947

Present: Canekeratne J.

EDWIN SINGHO, Appellant, and JAYASINGHE
(S. I. Police), Respondent.

S. C. 1,213—M. C. Gampaha, 32,315.

Criminal Procedure—Summary trial—Calling of defence witness by Magistrate before opening of prosecution—Irregularity—Criminal Procedure Code, section 425.

Where, in a summary trial, before the case for the prosecution was concluded, the Magistrate called the Medical Officer cited by the defence and thereafter postponed the trial for the rest of the evidence—

Held, that although the practice adopted was irregular and entirely contrary to the spirit of the Criminal Procedure Code, the irregularity was one which was curable under section 425 of the Criminal Procedure Code.

A PPEAL against a conviction from the Magistrate's Court, Gampaha.

Colvin R. de Silva (with him *K. C. de Silva*), for the accused, appellant.

J. G. T. Weeraratne, C.C., for the Attorney-General.

Cur. adv. vult.

March 11, 1947. CANEKERATNE J.—

The appellant was charged on April 25, 1946, with theft of a black bull belonging to one Charles and with attempting to stab P. C. Illangakoon. On his pleading not guilty the trial was fixed for June 3; on this date on the application of the prosecuting officer, the second count was withdrawn and the trial was postponed for July 15; a separate plaint appears to have been filed on this count. The trial took place on August 1, 1946, and the proceedings show the following:—

“Prosecution calls—

(Accused has cited the D. M. O. . . . as a witness for the defence. As this public officer cannot be kept hanging about the Courts I call him at this stage”.)

The medical witness testified that when he examined the accused on the afternoon of April 19, the latter had certain trivial abrasions, one on the neck, one near the jaw, two near the left ankle and one near the right ankle. After this evidence was recorded the trial was postponed for August 13 on which date police constable Perera and the owner of the bull gave evidence for the prosecution; the accused gave evidence on his own behalf and called two witnesses.

The version of the constable was as follows :—A party of four constables, including himself, went on patrol duty on the night of April 17 and while they were at a spot on the main road, where one Alpino had been murdered about 6 months before, they heard the footsteps of an animal that was being led from the direction of Golumahara paddy fields; while they were lying hidden they saw two men coming with a black bull along the footpath near this spot, one, the first accused, leading the animal, the other behind it: they rushed up and caught the accused while the other man escaped. As the accused struggled with his captors and made a violent effort to escape they had to use force on him, they held him by his legs and tied his hands with a handkerchief: the accused also attempted to stab one of the other constables.

The accused was, according to his evidence, walking peacefully along the footpath at an early hour of April 18 when the constables addressed him: "are you the chandiya?"; they tied his hands and took him to the Police Station where he was put into a cell; the Inspector then came and assaulted him mercilessly: all this happened to him because he abused the owner of the bull and a constable the previous day at a gambling den.

The Magistrate was not at all impressed with the story related by the accused. It is such an improbable story that one does not wonder at the Magistrate remarking that the defence was an afterthought fabricated two days later for the benefit of the A. S. P. The crucial test, according to him, in a case of this nature is the medical testimony and this testimony entirely corroborates the case for the prosecution. Counsel for the appellant strongly criticised the procedure adopted by the Magistrate in calling the defence witness first, thus enabling, according to him, the constable to bring his evidence into harmony with that of the medical witness. The practice adopted in this case is entirely contrary to the spirit of the Criminal Procedure Code in which the legitimate course of a trial is prescribed. The proceedings on August 1 were irregular. No departure from the recognised procedure should, as a general rule, be sanctioned by a Court for it is always safer to tread the well known path.

Before coming to a decision on the application made by appellant's counsel to send the case for a retrial before another Judge, it appeared better to examine the Police Information Book. The statement made by the constable as recorded therein amply bears out the story which he related in Court: it does not seem to be a story evolved after the evidence of the medical witness. The trial in this case was one within the jurisdiction of the Magistrate though an irregularity has occurred in the mode of conducting it; it does not vitiate the proceedings. The curative provisions of section 425 of the Criminal Procedure Code may well be applied to this case; the Privy Council applied the provisions of the

corresponding section of the Indian Code (section 537) to a case where the statutory provisions contained in section 360 of the Criminal Procedure Code (corresponding to section 299 of Ch. 16) regarding depositions had not been complied with (*Abdul Rahiman*, 54, I. A. 196).

The accused in this case gave his own version of the facts and called witnesses to substantiate his story; this story did not find favour with the Magistrate; without stultifying himself it would be difficult to set up any further defence. There is no necessity for setting aside the conviction, which is just and correct, simply because the procedure adopted was wrong.

The appeal is dismissed.

Appeal dismissed.

